No. 16,183

IN THE

United States Court of Appeals

For the Ninth Circuit

GEORGE OLSHAUSEN,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S APPLICATION FOR A REHEARING.

GEORGE OLSHAUSEN,
1238 Pacific Avenue,
San Francisco 9, California,
Petitioner.

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PETITIONER'S APPLICATION FOR A REHEARING.

To the Honorable Wm. Healy, William E. Orr, Oliver D. Hamlin, CJJ.

Petitioner respectfully asks for a rehearing in the above entitled case. A rehearing is necessary (1) to consider the impact of *C.I.R. v. Acker,* 28 L.W. 4009 on the question whether the penalties under 1939 Code Sec. 294(d)(1)(A) may be enforced by a deficiency notice; (2) to consider the point that there is no logical basis for a presumption of wilful neglect, and that such reverse presumption is unconstitutional as applied, at least where, as here, it is conceded that all *taxes were paid in full;* (3) because the opinion cites *Flora v. U. S.,* 357 U.S. 63, without noting that a rehearing was granted in that case; (4) because

the language of the statute is an inadequate basis for a finding of "wilful neglect"; (5) because the court has misunderstood the argument based upon the government's delay in making the claim.

We consider these in order.

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1. **THE OPINION FAILS TO CONSIDER C.I.R. v. ACKER, 28 L.W. 4009, IN CONNECTION WITH THE QUESTION WHETHER PENALTIES UNDER 1939 CODE SEC. 294(d)(1)(A) MAY BE ENFORCED BY DEFICIENCY NOTICE.**

a. *C.I.R. v. Acker,* 28 L.W. 4009 holds that the "addition" under 1939 Code Sec. 294(d)(1)(A) is a *penalty.* This the present opinion recognizes.

1939 Code Sec. 271(a)(1) defines a deficiency as follows:

> "271. *Definition of deficiency.*
>
> (a) *In general.* As used in this chapter in respect of a tax imposed by this chapter, 'deficiency' means the amount by which *the tax* imposed by this chapter, exceeds the excess of—
>
> (1) the sum of (A) the amount shown as *the tax* by the taxpayer upon his return, if a return was made by a taxpayer and an amount was *shown as the tax* by the taxpayer thereon, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over—
>
> (2) the amount of rebates, as defined in subsection (h) (2), made" . . . (Emphasis, except headings, added.)

Sec. 272(a) of the same Code provides that a deficiency notice may be sent, when there is a deficiency "in respect of the *tax*".

The obvious inference from this language is that a deficiency notice is not available to enforce a *penalty,* such as that under Sec. 294(d)(1)(A).

b. The cases which the opinion cites to the contrary, at pages 2-4 of the slip opinion are decisions of the lower federal Courts or of the Tax Court rendered *before the Supreme Court decision* in *C.I.R. v. Acker* (Nov. 16, 1959) 28 L.W. 4009. None of them, therefore, takes that opinion into account.

Likewise the rule "pay first and litigate later" was a rule applicable to *taxes,* not to *penalties.* This is shown by *Felton v. U. S.,* 96 U.S. 699, in which a penalty similar to the present one was enforced by a common law action. The quotations on pages 3 and 4 of the slip opinion confuse a tax and a penalty. So also on page 7 of the present opinion the Court refers to the penalty under 1939 Code Sec. 294(d)(1)(A) as both an "additional tax" and a "statutory penalty" *in one and the same sentence.*

Everything said on this subject in the present opinion and in earlier opinions, is said without reference to the holding of *C.I.R. v. Acker* that the "additions" under 1939 Code Sec. 294(d)(1)(A) are a penalty and not a tax.

A rehearing should be granted to consider the effect of the Supreme Court holding on this question.

2. REVERSED BURDEN OF PROOF UNCONSTITUTIONAL AS APPLIED.

The opinion says that the reversed burden of proof stems from the statute itself, rather than from Rule 32 of the Tax Court. We may accept this view for purposes of argument, since the result is the same either way.

"Wilful neglect" has been defined as requiring " 'a bad purpose' " or " 'non-justifiable excuse' " (*Felton v. U. S.,* 96 U.S. 699, 702; *Heikkinen v. U. S.,* 355 U.S. 273, 279). *It is evidently something more serious than simple negligence.*

The opinion says (p. 6) that "(wilful neglect) is a logical conclusion from . . . (failure to file)".

We submit that if "failure to file" points logically to any "bad purpose" it would be a purpose to evade taxes. *But when the taxes are admittedly paid in full, failure to file cannot have the purpose of tax evasion—nor any other purpose.*

At least as applied to the admitted facts of this case, the reverse presumption rests on an inference having no support in logic or common experience.

At page 6 of the opinion the Court says, "the taxpayer can easily explain his failure if good cause existed therefor". Precisely such a burden of explanation of non-negligence was held unconstitutional in *W. & A. Ry. Co. v. Henderson,* 279 U.S. 639, 640.

3. REHEARING GRANTED IN FLORA v. U. S., 357 U.S. 63.

At page 4 of the slip opinion the Court cites *Flora v. U. S.*, 357 U.S. 63.

A rehearing was granted in this case on June 22, 1959 (27 L.W. 3361) and it was re-argued on November 12, 1959 (28 L.W. 3171).

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4. LANGUAGE OF STATUTE INSUFFICIENT BASIS FOR FINDING OF WILFUL NEGLECT.

At page 7 the Court says:

> "The absence of express instructions on the point would not excuse ignorance of the unambiguous requirement contained in §58 of the Internal Revenue Code of 1939."

This opinion itself shows that "unambiguous requirements" are not a definitive guide. The "unambiguous requirement" for a deficiency notice is a deficiency in the *tax*—not the claim of a penalty. Yet this opinion holds the deficiency notice applicable to a *penalty*.

If "unambiguous requirements" are controlling, then the deficiency notice cannot be used to enforce a penalty; if "unambiguous requirements" are *not* controlling, then they are no basis for a finding of wilful neglect.

5. OPINION MISCONCEIVES ARGUMENT ON LIMITATION OF RECOVERY.

On page 7 of the slip opinion it is said:

> "We see no merit in petitioner's contention that he should be *excused* from the payment of the additional tax because had demands for the statutory penalty been made earlier he would have been required to pay less". (Italics added.)

The argument in this part of petitioner's brief was not the payment should be *excused,* but that it should be *limited* to the amount accrued at the end of the first year—$48.97.

See Petitioner's Opening Brief, pages 48-51.

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6. CONCLUSION.

The rehearing should be granted and the judgment of the Tax Court reversed *in toto.*

Dated, San Francisco, California,
December 30, 1959.

Respectfully submitted,

GEORGE OLSHAUSEN,
Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am the petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
December 30, 1959.

GEORGE OLSHAUSEN,
Petitioner.